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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970 ~~1607~~ No. 70-129

RONALD E. CLARK, M.D.,

Petitioner,

-vs-

PEOPLE OF THE STATE
OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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13050 Gavel Avenue
Detroit, Mich. 48227

Attorney for Petitioner

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To the Honorable Warren E. Burger, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I

JURISDICTIONAL GROUNDS

and

STATE COURT REFERENCES

That review is sought from a criminal appeal in the Michigan Court of Appeals decided September 28, 1970, People v Clark, 26 Mich App 475, 182 N.W. 2d 632, where the Michigan Supreme Court denied leave to appeal on January 22, 1971. Petitioner relies on 28 U.S.C. 1257 (3).

STATEMENT OF THE CASE

The Doctor and His Treatment

Dr. Clark, the defendant herein, has a Bachelor's Degree at Carlton College in 1933, a Master's Degree in 1934 and a Doctorate in Biochemistry at the University of Minnesota in 1937. The Doctor did further research work with National Corn Starch Products' Company in New York and taught at Wayne University in Detroit and directed that school's laboratory of Surgical Research in 1937. Dr. Clark graduated from Medical School in 1943 after internship at Wayne County General Hospital, was Health Officer for Redford Township and has been in General Practice since that time. In 1955, he received a diploma in Psychosomatic Medicine from the University of Vienna in Austria, where he developed a cure for obesity and for weight maintenance involving Chemotherapy; whereby the anxieties of a patient, resulting in inability to control one's appetite, were relieved by Pseudo-Psychiatric suggestion. The method involved

putting the patient under a light plane of chemically induced hypnosis; during which, due to the relaxation of the conscience mind, the patient could be questioned and the patient's answers recorded for later review with the patient so as to relieve anxieties. (13a)

THE PATIENT'S DEATH

On November 3, 1967, Grace Neil, a patient of Dr. Clark, died at the Farmington Medical Group Clinic in Farmington Township, Oakland County, Michigan. The decedent appeared in good physical health prior to her death. She had received numerous Pentothal treatments over the years from Dr. Clark, without untoward event. She was treating with Dr. Clark, according to statements Dr. Clark allegedly made to the People's witnesses, for obesity, high blood pressure and "heart trouble". The Doctor listed her death as due to Coronary Thrombosis; although he had, previous to her death, given an intravenous drip treatment with Sodium Pentothal, a "truth serum". Defendant's wife was uncontradicted in her statement that she was present and had observed that the Doctor had finished administering Pentothal and interviewing the patient and had switched to a harmless saline solution (14a), when he exited from the treatment room. The patient was then left in the treatment room while the Doctor prepared to leave for the weekend, it being a Friday and after office hours (14a). His wife then entered the treatment room a few minutes later to find Grace Neil cyanotic and close to death, if not already so (16a). The saline solution bottle was empty (16a). The Doctor called various relatives of the deceased, the minister of the deceased and an undertaker. Mr. Tharon Neil stated that when he arrived, the Doctor and Mrs. Clark were

alternately giving artificial respiration to his wife (19a). Sgt. Teeples testified that oxygen equipment was present (19a), and the pathologist testified that Grace Neil had apparently received a direct, emergency injection of adrenalin in the heart (20a).

THE INVESTIGATION

On the night of November 3, 1967, according to Patrolman M. Dale Hall of the Farmington Township Police, he was merely cruising along the road in front of the Doctor's clinic when he noticed a hearse illegally parked on the road. He went into the clinic and went through a reception room and into a treatment room where he found Grace Neil's body (22a). Detective Teeples was then contacted by Patrolman Hall (24a) and he took up the investigation from there, including interrogating the Doctor and seizing the patient's records, which were later to become important at the trial. In 1970, Detective Teeples would testify that he had no search warrant at the time of the seizure. Linda Klingman, a secretary of Teeples, in 1971, testified that it was in fact Teeples who directed Hall to investigate a dead body at the clinic. Mrs. Klingman came forward when a Meritorious Citation was to be given by Teeples to Hall for Hall's investigative work in the Clark case. (Transcript being prepared)

THE EXAMINATION AND THE TRIAL

Dr. Clark was arrested on November 14, 1967, eleven (11) days after Grace Neil's death. During the interval, he was questioned on several occasions by the Farmington Township Police, and the arrest came only after he left the city for the first time in two (2) weeks to go to a cottage in Michigan's

thumb district. The Doctor was virtually without funds because he had conveyed his real and personal property in trust to his office manager, who had died in March of 1967, leaving the Doctor's property to her heirs. The Doctor, four (4) years after her death and at the time of parole review on the present case, has been charged with her death by the authorities. The former Mayor of Pontiac and a widely respected divorce attorney, Phillip Rowston, was appointed by the trial Judge, Mr. Rowston's former law partner, to represent Doctor Clark. The Judge had handled a Diathermy Burn case against the Doctor some years previously and had signed a Judgment with a blank line for the amount. Unfortunately, no Motion to Disqualify the Judge was made by Doctor Clark's appointed counsel. Widespread television coverage of the arrest, the examination and the events surrounding the trial caused appointed counsel to move for a change of venue which was granted.

Defense counsel was notified by way of information that the defendant was charged with:

> " Injecting into the body of Grace Neil an excessive quantity of Sodium Pentothal and by so injecting the Sodium Pentothal into the body of Grace Neil, and thus improperly performed and grossly neglected the legal duty that he, as a physician, owed to Grace Neil, and committed Manslaughter. . . "

No mention was made of the Doctor's facilities or of his resuscitative equipment at the Preliminary Examination. At the trial, held in the Summer of 1968, some seven (7) expert medical witnesses testified that they would not use Sodium Pentothal for hypnotic purposes, for obesity, high blood

pressure, heart trouble or any ailment and that they would not use Pentothal in a rural clinic, but rather only in a city hospital and one that would have the full facilities and personnel afforded by a modern city hospital before using Sodium Pentothal as an anesthetic. Michigan Court Rules allow but three experts to a given issue. However, no attempt was made to preserve the issue for review. Testimony was introduced by the deputy coroner, an Osteopath, to the effect that Doctor Clark told the witness that a figure "170/" on the deceased's treatment card, before its seizure, as being the patient's weight and if not the patient's weight, then Doctor Clark's weight (25a). The treatment card was again referred to by the Prosecutor in his closing statement, when he attributed the absence of the card as follows:

> " You will remember that Dr. Posner in his testimony was asked whether or not you would keep good records of Sodium Pentothal as it was administered to a patient in the amount and what not. Dr. Sweet was asked this same question. And they both indicated yes, that it was essential to keep good records.
>
> But we have never seen any records of the amount given to Grace Neil on that date. " (462)

No objection was made to testimony or argument, nor was any continuance requested in order that counsel might obtain copies of the treatment cards held by the authorities. However, during March of 1968, more than three (3) months prior to trial, appointed counsel did make a request that the treatment cards and other materials be returned to Doctor Clark (3a). Some materials were returned as is noted in the affidavit of Phillip Rowston,

annexed hereto and made a part hereof. But, Mr. Rowston was informed that the card had been "lost" by the authorities (5a).

A lethal dosage was testified to by S. David Kutob, Ph.D., a State Chemist. He stated his sources for his conclusion. These went unread and unchallenged at the trial. Mr. Kutob reported a finding of 3.2 Milligram Percent, or 32 parts in 10,000, of Pentothal in the blood of the deceased at both the examination and the trial. At the trial he further testified that he had found 17.1 Milligram Percent, or 171 parts in 10,000, of Pentothal in the brain tissue of the deceased. Counsel for defense moved for a new trial based upon the surprise resulting from the latter finding, as well as the prejudicial result of the missing treatment card together with the prejudicial effect of placing armed guards about the court room at the commencement of the closing argument, among others.

THE MISSING AND DESTROYED EVIDENCE

In addition to the "lost" treatment cards, evidence of the alleged crime in the form of the body organs of the deceased, were destroyed by the State. The defense had an opportunity to have an independent expert examine the organs so as to determine the validity of the State Chemist's findings. Roy Aston, Ph.D. of Wayne State University Medical Laboratory did examine the body organs for Pentothal and concluded that no Pentothal was present in appreciable quantities. His testimony was not used by the defense, although he later testified at a Medical License Board hearing, and testified to the effect that not only did he not find appreciable Pentothal, but that accepting the figures of the State Chemist, and working backwards with the weight of

the deceased, he concluded that an ordinary non-lethal dosage was administered (34a).

In December, 1970, S. David Kutob testified that he had destroyed all of the organs relating to the Doctor Clark case, and that he was not aware of any appeal in the Grace Neil case. (34a) Under oath he admitted that (1a) was a true copy of a note from his secretary. The note clearly indicates that Mr. Kutob was informed of the appeal and of the failure of the defense counsel to be able to obtain specimens of all of the organs held by Mr. Kutob. On appeal to the Michigan Court of Appeals, a specific Motion was made for the Production of Specimens of Organs in order that they could be independently examined outside of the State Chemist's Laboratory, questions having arisen as to the validity of the State Chemist's findings. There was a further Motion for a Remand of the case to the trial court in order that a hearing could be had on false and suppressed evidence. Both Motions were denied. The Motion for a Remand was appealed to the Michigan Supreme Court. Leave to Appeal was denied in 1969.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

WHETHER OR NOT A STATE CRIMINAL CONVICTION MUST BE SET ASIDE, WHERE THE CONVICTION IS BASED UPON SECONDARY TESTIMONIAL EVIDENCE, THE BEST EVIDENCE, A DOCUMENT, HAVING BEEN SEIZED BY STATE AUTHORITIES AND THEN LOST OR DESTROYED BY THE SAME AUTHORITIES AND WHERE THE STATE THEN ATTRIBUTES THE ABSENCE OF THE DOCUMENT TO DEFENDANT DURING THE ARGUMENT TO THE JURY?

The State Circuit Court answered this question "NO" by refusing to grant a new trial.

The Michigan Court of Appeals answered this question "NO".

The Michigan Supreme Court refused to review the matter.

Petitioner contends the answer should be "YES".

II

WHETHER OR NOT THE CONVICTION OF DEFENDANT ON THE BASIS OF REPEATED INFERENTIAL QUESTIONS TO EXPERT WITNESSES AND INTENTIONAL PREJUDICIAL MISSTATEMENTS TO THE JURY AND THE VERDICT IS BASED THEREON, WHERE THE RECORD IS DEVOID OF EVIDENTIAL SUPPORT FOR SUCH STATEMENTS AND QUESTIONS, IS A VIOLATION OF DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The State Circuit Court answered this question "NO" by refusing to grant a new trial.

The Michigan Court of Appeals answered this question "NO" by adopting said misstatements as a part of its "facts".

The Michigan Supreme Court refused to review the matter.

Petitioner contends the answer should be "YES".

III

WHETHER OR NOT PROCEDURAL DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT ARE VIOLATED WHERE DEFENDANT IS APPRAISED OF THE NEGLIGENT ACTS WHICH HE MUST DEFEND BY WAY OF AN INFORMATION AND A PRELIMINARY EXAMINATION IN AN INVOLUNTARY MANSLAUGHTER PROSECUTION AND THEY INDICATE THAT DEFENDANT'S NEGLIGENCE CONSISTED OF ADMINISTRATION OF AN OVERDOSE OF A DRUG, AND WHERE EVIDENCE WAS ADMITTED OVER OBJECTION AT TRIAL WHICH WENT TO OMISSIONS OF DUTY TO REVIVE AND TO MAINTAIN HOSPITAL BUILDING, EQUIPMENT AND PERSONNEL STANDARDS AND OTHER MATTERS OF WHICH DEFENDANT RECEIVED NO NOTICE BEFORE TRIAL?

The State Circuit Court answered this question "NO" by overruling trial counsel's objections.

The Michigan Court of Appeals answered this question "NO".

The Michigan Supreme Court refused to review the matter.

Petitioner contends the answer should be "YES".

ARGUMENT

I

WHERE A STATE CRIMINAL CONVICTION IS BASED UPON SECONDARY EVIDENCE, THE BEST EVIDENCE HAVING BEEN SEIZED FROM THE DEFENDANT BY THE AUTHORITIES AND THEN LOST OR DESTROYED BY THE SAME AUTHORITIES AND WHERE THE STATE ATTRIBUTES THE LOSS TO DEFENDANT DURING ARGUMENT TO THE JURY, THE CONVICTION SHOULD BE SET ASIDE.

Defendant, Doctor Ronald Clark, was made to appear negligent, incompetent and ridiculous before a jury in an involuntary manslaughter case by the use of a County Deputy Coroner's statement (24a & 25a) indicating that Defendant told the witness that the figure 170/ on the deceased's treatment card was deceased's weight, followed by the alleged statement that it was Defendant's weight on his patient's medical treatment card. Numerous medical witnesses commented on the contraindications of administering Pentothal to a heart patient. This testimony could only be refuted by the best evidence of the matter---deceased's medical treatment record. This card was admittedly "lost" by the authorities after they had seized the card on the night of the death of Grace Neil. This did not, however, prevent the prosecution from using testimony relating to the contents of this record or inferring illnesses not reflected by the medical record or an autopsy.

Even more prejudicial to the Defendant's case was the comment by the prosecutor on the absence

of the card and laying blame for the absence on Defendant in the argument to the jury:

> " You will remember that Dr. Posner in his testimony was asked whether or not you would keep good records of Sodium Pentothal as it was administered to a patient in the amount and what not. Dr. Sweet was asked this same question. And they both indicated yes, that it was essential to keep good records.
>
> But we have never seen any records of the amount given to Grace Neil on that date."

Thus, a testimonial case was built by the State which could only be refuted by the "best evidence" seized by the State and then the absence of the evidence was attributed to Defendant to enhance his appearance as a criminally negligent medical practitioner. Knowing suppression of rebuttal evidence by a State invalidates a conviction, Miller v Pate, 386 U.S. 1, 87 S. Ct. 785 (1967). The question in this case goes to whether "knowing suppression" includes alleged innocent loss by the State of the best documentary evidence, followed by use of prejudicial and incriminatory secondary testimonial evidence which could not be rebutted except by forcing the Defendant to testify, followed in turn by attributing the loss to Defendant, where Defendant's negligence is the principal issue in the prosecution. Bad faith by the prosecution seems to be at the bottom of the rule, Giles v Maryland, 386 U.S. 66, 100, 87 S. Ct. 793, 810, (1967). Since a "criminal trial is not a game in which the State's function is to outwit and entrap its quarry" the comment by the prosecutor on the failure of the Defendant to produce the "lost" card surely transcended all bounds of fair conduct and a reversal should follow.

The Michigan Court of Appeals would not answer this issue stating that it had not been preserved for appeal by court appointed counsel at trial. However, the Appellate Court did note that the trial court did rule on the issue when presented in a motion for a new trial. The State Court of Appeals had further refused to remand the case to the trial court for an evidentiary hearing on the use of false evidence and the suppression of evidence two years earlier and leave to appeal the matter was denied by the Michigan Supreme Court as well. Thus both appointed and retained counsel for Defendant had done all that could be expected to preserve the issue in the face of the prosecutor's argument that the evidence was unaccountably lost.

The State authorities "good faith" must also be viewed against a background of other missing evidence in the case and false testimony. The body organs and blood of the deceased were conveyed to the State Health Laboratories after a week-end stay in the home refrigerator of Farmington Township Police Sergeant Teeples (27a). Tests were then conducted and a defense expert was allowed to examine the organs and blood. For unknown reasons, appointed counsel did not call the expert to testify, although he was called at a State Medical Licensing Board Hearing, where he testified that no appreciable quantities of Sodium Pentothal were detected. At the time of this hearing, the organs and blood had been thrown away by the State's expert. Earlier he had assured appointed counsel that the specimens were being preserved (3a). A motion was made in the Court of Appeals in 1968 to obtain samples of each of the organs and the blood for further confirmatory testing outside the State. This motion was vehemently opposed by the State and the Court

of Appeals denied the motion without comment. It was only in December of 1970, that it came to light that the specimens relating to the Clark case were destroyed. (34a)

S. David Kutob, the State Chemist, had never tested for Sodium Pentothal before and was new to the department at the time of the Clark case, (34a & 29a). At the examination Kutob testified that a source of his conclusions on lethal dosages of Pentothal was probably Dr. Irving Sunshine (29a). Dr. Sunshine disclaimed any such reference (12a). He therefore was sent to Philadelphia to obtain the corroborating testimony of Frederick Reiders, a toxicologist for the City of Philadelphia. However, again at the trial, Kutob made additional references to his sources, but was unchallenged. Following the trial it was discovered that his conclusions were questioned by others and this was one ground for a motion for a new trial (7a). Still later, on appeal, his quoted sources were found either not to support Kutob's conclusions or that they contradicted his very conclusions. A motion was made for a remand at this point but this was denied (9a & 10a).

II

THE CONVICTION OF DEFENDANT IS A VIOLATION OF DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE JURY'S VERDICT IS BASED UPON REPEATED INFERENTIAL QUESTIONS TO EXPERT WITNESSES AND INTENTIONAL PREJUDICIAL MISSTATEMENTS TO THE JURY AND WHERE THE RECORD IS DEVOID OF EVIDENTIAL SUPPORT FOR SUCH STATEMENTS AND QUESTIONS.

The State repeatedly in the closing argument insisted that Doctor Clark had left the room while Grace Neil was receiving Sodium Pentothal, "which dripped into her veins and snuffed her life out":

" He also told Detective Teeples that he had left the room while he was giving the Sodium Pentothal". (458)

" Each of the doctors testified that the rate of flow in this drip method can change if you are not present." (461)

" He walked out of the room and he left the infusion, Sodium Pentothal, running into her." (465)

The argument was not objected to and only briefly answered by reference to the testimony. Repeated questions to the expert witnesses inferred the same falsity. But if the jury was misled by the repeated misstatements, they are not alone. The Michigan Court of Appeals reviewed the following in the State's Counter Statement of Facts:

Page 1:

" on the night of decedent's demise, the Defendant had infused her with an intravenous injection of Sodium Pentothal and then exited from the treatment room and left her unattended."

Page 8 :

" Violet Clark, the Defendant's wife, was the last defense witness. She indicated several times that Doctor Clark had left

> Grace Neil alone on November 3, 1967, when she was receiving the fatal Sodium Pentothal infusion."

And the Appeals Court then stated in its Opinion:

182 N.W. 2d 632, 633 2nd paragraph:

> "Other witnesses' testimony indicated that Dr. Clark had left the patient unsupervised during the infusion of the drug."

And at Page 635:

> " Expert opinion clearly established that the failure to constantly supervise a patient being infused with Sodium Pentothal was violative of accepted medical standards. . . "

And Page 635:

> "...and left Mrs. Neil alone in the examination room during infusion." (emphasis added)

The matter was briefed in the Michigan Supreme Court, but to no avail, Leave to Appeal was denied.

The record on the matter is clear:

Page 87, Direct Examination of Detective Teeples:

> A "... He said that he had been treating her, giving her a treatment of Sodium Pentothal, and she was receiving this treatment by drip method intravenously.

> And that his wife had gone into the room where she was laying on the couch receiving this treatment, and had found her dead."
>
> A..." He told me that she had been in the room alone taking the treatment and that his wife had gone in and found...."

Page 110, Cross Examination of Detective Teeples:

> Q "You don't know, then, whether this bottle that she had was the first or the second bottle that she had received that evening, do you?"
>
> A "I don't know which number bottle it was; yes, sir."
>
> Q "You don't know nor was any discussion held concerning whether or not this bottle that you saw contained only pure saline solution?"
>
> A "I have no idea, sir."

The uncontradicted testimony of the doctor's wife was that a harmless saline solution was flowing into the patient's veins, when the doctor left the room; the hypnotic psychotherapy portion of the treatment having been concluded (15a).

That the State willfully misstated the evidence is shown by the repetition of the misstatements to the Court of Appeals. That reasonable men could be prejudiced by such statements is shown by the Court of Appeals' adoption of the statements without

compliance with Defense counsel's request that the record be searched by the Court of Appeals. The gist of the offense charged was the absence of Defendant from the treatment room while his patient was being infused with a dangerous drug. The point was argued but not proven. It is a violation of due process requirements to convict and punish a man without evidence of his guilt, Thompson v City of Louisville, 362 U.S. 199. 80 S. Ct. 624 (1960).

III

WHERE DEFENDANT IS APPRAISED OF THE NEGLIGENT ACTS WHICH HE MUST DEFEND BY WAY OF AN INFORMATION AND A PRELIMINARY EXAMINATION IN AN INVOLUNTARY MANSLAUGHTER PROSECUTION AND THEY INDICATE THAT DEFENDANT'S NEGLIGENCE CONSISTED OF ADMINISTRATION OF AN OVERDOSE OF A DRUG, AND WHERE EVIDENCE WAS ADMITTED OVER OBJECTION AT TRIAL WHICH WENT TO OMISSIONS OF DUTY TO REVIVE AND TO MAINTAIN HOSPITAL BUILDING, EQUIPMENT AND PERSONNEL STANDARDS AND OTHER MATTERS OF WHICH DEFENDANT RECEIVED NO NOTICE BEFORE TRIAL, PROCEDURAL DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT ARE VIOLATED.

The Michigan Court of Appeals refused to review this issue, stating that the information sufficiently charged Statutory Manslaughter and that Defendant did not object at trial.

Looking to the record (72):

> Q. "Did this room, Doctor, which you just described, did it appear to be a room

that might be found in any other doctor's office within the county of Oakland, same manner, same fashion?"

A "Well, it...

Mr. Rowston (interposing) If it please the Court, I will object to that as being immaterial. I don't see what significance that has in this case."

The objection was overruled and no continuing or more specific objection was made by court appointed counsel to the flood of testimony criticizing Defendant's treatment, his offices revival equipment, staff and even his psychiatrists couch, (72, 154, 241, 159).

The information defined the specific act of negligence charged, "in that he, the said Ronald E. Clark, did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal."

By no stretch of imagination could Defendant infer, prior to trial, that an oxygen mask or his psychiatrist's couch would be subjects of central attention for the jury's benefit during trial and in the closing argument (460, 461, 450).

In view of the length of the State's argument to the jury on these items, there can be little doubt that they had a prejudicial effect on the juror's minds and their verdict indicating a gross negligence finding---hardly a harmless error.

In Michigan as elsewhere it is the rule that unless the words of the Criminal Statute are complete in their definition and description of an offense

resulting from or arising out of an act not criminal in itself and contain all the essential ingredients thereof, all matters and circumstances which are necessary to show the illegality of the act or omission on which the accusation is based must be included in the information.

People v Ryczek, 224 Mich 106;

People v Maki, 245 Mich 455:

People v Townsend, 214 Mich 267, 183 N.W. 177, 16 A. L.R. 902 (1921)

The last case states at Page 274:

> but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged as well as the acts of the accused constituting failure to perform or improper performance.

It would seem clearly established by the principles propounded by this Court that it is fundamental and of jurisdiction importance that the accused have notice of that which he is charged with in order that he might meet or explain the accusations. Cole v State of Arkansas, 333 U.S. 196, 201; 68 S. Ct. 514, 517; 92 L. Ed. 644 (1948); in re Oliver, 333 U.S. 257, 275; 68 S. Ct. 499, 508; 92 L. Ed 682 (1948).

It is apparent from the fact that of eight full days of trial the defense occupied but one single day and consisted of two lay witnesses and a single expert against a "formidable array" of experts in the words of the prosecutor, indicates defense preparation for but the single accusation made and noticed.

CONCLUSION

Stripped of the necessary evidence for cross examination of State witnesses; deprived of advice of the many charges of negligence against him and prejudiced by repeated reiteration of deliberate misstatements of the evidence, the accused in this case could hardly be expected to put up any more than the half-hearted defense found in the record. The Fourteenth Amendment therefore dictates a reversal and a remand on the constitutional issues presented herein in order that Defendant may have a fair chance---a fair trial.

It is respectfully submitted that Defendant's Writ of Certiorari should be allowed since the Michigan Court of Appeals has not decided the substantial Federal questions presented by this appeal in accord with applicable decisions of this Court.

Respectfully submitted,

JAMES E. WELLS

Attorney for Petitioner

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NOTE TO S. DAVID KUTOB FROM SECRETARY

Doctor Kutob:

Bruce Leitman phoned 11-15-68 at 1:30 pm with reference to the materials submitted to you on Hannah Bowerbank, deceased, patient of Dr. Clark.

Bruce said, first, that the Court of Appeals have denied their motion to have all the tissues, etc. turned over to the defense, in the Grace Neil matter.

Second, he wanted to know if you would consent to permit a qualified scientific observer for the defense, to be approved of by you in advance, watch you do the analytical work on the Hannah Bowerbank specimens. He felt that if he did permit such an observer to be present, it could save you a lot of extra work and bother, should your results disclose toxic concentrations of a substance. He has stated there is to be only one person, to be approved of by you and him, in advance. He further said he was going to see to it that (as I understood him) Mrs. Clark isn't to bother you in any way, come up here, phone, write or anything else.

Will you phone him Monday, and discuss the matter with him. The number is 338-4751, extension 573 (the extension number is changed).

Virginia

LETTER TO S. DAVID KUTOB FROM
BRUCE T. LEITMAN

January 9, 1969

S. David Kutob, PHD
Chief Toxicologist
Division of Crime Detection
Department of Public Health
3500 N. Logan
Lansing, Michigan 48914

RE: Analysis of Hannah Bowerbank

Dear Dr. Kutob:

On or about January 3, 1969, you submitted to this office the results which you obtained from a toxicological examination of the remains of one Hannah Bowerbank.

Please be advised that it is the strong desire of this office that, under no circumstances, you permit any scientist or physician to examine these remains without the express written permission of this office. This includes scientists who wish to run examinations at your office or at any other place.

Furthermore, because of the legal technicalities involving this case, it is my wish that you refuse to communicate with any member of the Clark family, their Attorneys, or the persistent press.

If it becomes necessary for someone to have access to your analysis or to you, then I will so indicate by express writing.

Thank you very much for your cooperation in this matter.

Very truly yours,

/s/ Bruce T. Leitman
Bruce T. Leitman
Assistant Prosecuting Attorney

BTL/jt

LETTER TO PHILIP E. ROWSTON
FROM S. DAVID KUTOB

STATE OF MICHIGAN
DEPARTMENT OF PUBLIC HEALTH
3500 N. Logan
Lansing, Michigan 48914

August 14, 1968

Mr. Philip E. Rowston
Dieterle, Rowston & Mann
2057 Orchard Lake Road
Pontiac, Michigan 48053

RE: Dr. Ronald E. Clark

Dear Mr. Rowston:

In response to your letter dated August 8, 1968, concerning specimens taken from Grace Neil, deceased, we still have the samples and they have been refrigerated.

Sincerely yours,

/s/
S. David Kutob Ph. D.
Toxicologist
Division of Crime Detection

SDK:vb

cc: Mr. Bruce Leitman

C67-3961

AFFIDAVIT OF PHILIP E. ROWSTON

AFFIDAVIT

STATE OF MICHIGAN)
ss.
COUNTY OF OAKLAND)

PHILIP E. ROWSTON, being first duly sworn, deposes and says:

1. That he was Court appointed Counsel for Ronald E. Clark, M.D., Respondent, in a criminal prosecution involving manslaughter from December 1967 to December 1968.

2. That on March 15, 1968, Mr. Bruce Leitman, Assistant Prosecutor of Oakland County, was requested by letter to furnish certain records including patient cards of the deceased Grace Neil.

3. That on April 4, 1968, Mr. Leitman advised me by telephone that certain records were being mailed from the Farmington Township Police Department but when no records were received, Mr.

Leitman accompanied me to the office of the Farmington Police Department on April 17th, 1968 and through his personal efforts and assistance, the 1966-67 Day Book; Folder of Grace Neil and Electrocardian Tape were obtained.

4. That the Patient Cards of Grace Neil covering the period of treatment to the date of her death were unavailable and were not returned at this time.

5. That during the trial, in response to a demand to produce said Patient Cards, the investigating officers of the Farmington Township Police Department and a member of the Oakland County Prosecutor's Department produced only two 4 x 6 Yellow Treatment Cards and stated that the most recent treatment card covering the period of time immediately prior to the death of Grace Neil was in fact "lost".

6. That said lost or missing card was vital to the defense of the Respondent and precluded cross examination of one or more of the People's witnesses concerning various pertinent facts.

Further Deponent sayeth not.

/s/ Philip E. Rowston
PHILIP E. ROWSTON

Subscribed and sworn to before me, a Notary Public, this 3rd day of February, A.D. 1970.

/s/ Mary R. Good
Mary R. Good
Notary Public for the County
of Oakland, State of Michigan

My commission expires: 1-9-71

MOTION FOR NEW TRIAL

Now comes the above Defendant by PHILIP E. ROWSTON, his Attorney, and moves the Court for an Order setting aside the conviction and vacating the sentence heretofore imposed in said cause and granting a new trial, for the following reasons:

1. Because the verdict of the Jury is contrary to the law.

2. Because the verdict of the Jury is contrary to the great weight of the evidence.

3. Because of the prejudicial misconduct of two-armed, uniformed Officers of the Ingham County Sheriff's Office when they appeared in open Court and positioned themselves at the main entrance of said Court Room in Mason, Michigan, as the case was resumed for final arguments by the Prosecutor and instructions to the Jury, in that their presence created a presumption of fact to the Jury that the Defendant was guilty and likely to attempt an escape from the Courtroom before they commenced their deliberation, and said impression biased and prejudiced the Jurors in their consideration of the case and resulted in a miscarriage of justice.

4. Because the Court erred in denying Respondent's Motion for a mistrial in that the three local newspaper reports quoted to the Court clearly indicated that the Respondent was being tried for Murder instead of Manslaughter and that Wayne and Oakland County Officials were investigating other deaths attributed to the Respondent, all of said newspaper releases being prejudicial and biased, which prevented the Respondent from receiving a fair and impartial trial and resulted in a miscarriage of justice.

5. Because one of the People's expert witnesses, Dr. S. David Kutob, testified at the trial hereof, that he had analyzed the brain tissue of the deceased, only a week prior to said trial, and found 17.1 mg percent concentration of Thiopental which is inconsistent with his previous testimony that he found 3.1 mg percent concentration of Thiopental in the blood sample taken from the deceased and that Respondent was taken by surprise and was unable to secure competent testimony to rebutt the opinion of this expert witness before the trial was concluded.

6. Because since the hearing of said cause, Respondent has just learned of the testimony of DR. LESTER C. MARK, a witness who was unknown to him at the time of said trial and whose testimony is material to the issues of said cause and would be likely to change the results thereof, and, if, a new trial is granted, herein, said witness will be available and will testify in behalf of the Respondent that a 3.1 mg percent blood concentration of Thiopental is not lethal and that there is a likelihood of technical errors in methodology concerning the testimony that a concentration of 17.1 mg percent was found in the brain tissue since that amount is disproportionately large in comparison with that of 3.1 mg percent concentration in the blood and that technical errors are more likely to occur with tissue analyses, which are more complicated than blood analyses, and that all samples of decedent should be re-examined and analyzed to determine the Thiopental concentration present in each organ for a more comprehensive comparison.

7. Because the patient's records of Grace Neil were not furnished Respondent prior to the trial although requested on March 15th, 1968, which prevented the Respondent from conducting the required

research and review of his patient's prior history of treatments and resulted in a miscarriage of justice.

This Motion is based upon the records and files in said cause and upon the Affidavits of PHILIP E. ROWSTON and DR. LESTER C. MARK, hereto attached.

Philip E. Rowston
PHILIP E. ROWSTON
Attorney for Defendant,
Ronald E. Clark, M.D.

Dated: August 8, 1968

MOTION FOR REMAND AND
BRIEF IN SUPPORT OF MOTION

MOTION FOR REMAND

Now comes, RONALD E. CLARK, M.D., Defendant-Appellant above, by his attorney, JAMES E. WELLS, and moves the Court to order a remand of the above entitled cause for a hearing of evidence relating to the knowing use by the state of false evidence and suppression of evidence in the above cause, or alternatively to order an extension of time of thirty (30) days for filing appellants brief or taking other action, for the following reasons:

1. The state used the testimony of a state employee and chemist, S. David Kutob, which was crucial in obtaining the conviction of appellant. (record, P. 39, P. 45 et seq.)

2. That said testimony was false, misleading and at variance with physical facts known to experts in a particular field and was calculated to bring about appellant's conviction.

3. That said testimony was alleged at the trial to have been based upon certain references which do not in fact support the testimony and tend to discredit said testimony.

4. That one such reference does not at all exist and was referred to at the preliminary examination (Transcript P. 59 and 60 annexed hereto) and the trial. (record, P. 57, Affidavit of Irving Sunshine, M.D. annexed hereto)

5. That said reference was questioned by defendant's attorney at the preliminary examination.

6. The following said examination and prior to trial the state employee was send to the city of Philadelphia in the State of Pennsylvania and elsewhere to find an expert who would corroborate the state employee's testimony.

7. That Frederic Rieders, a chemist employed by the city of Philadelphia, responded and testified at the trial in substantiating S. David Kutob's statements.

8. That said Rieders' corroborating testimony is in conflict with his own published works.

9. That the above facts have only recently come to the attention of appellant's attorney on appeal.

10. That the aforesaid hearing concerns a factual matter involving experts that would be dispositive of the appeal under the authority of Miller -vs- Pate, 386 U.S. 1.

11. That in the event, this Court denies the motion, for any reason, appellant will require an

additional time extension of thirty (30) days to file his briefs or to seek further appeal on this motion.

This motion is based on records and files in this cause together with the attached exhibits.

/s/ James E. Wells
James E. Wells
Attorney for
Defendant-Appellant
13050 Gavel Avenue
Detroit, Michigan 48227
933-4143

Dated: May 9, 1969

BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR REMAND

The People urge that the issue presented by Appellant's motion was waived by Appellant's court-appointed trial counsel, a former law partner of the trial judge, or that present counsel is estopped to raise such issue.

MILLER -vs- PATE, 386 US 2; 87 S. Ct. 785 held that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."

It would seem that there can be no passive waiver of procedural due process. The testimony in question is admitted by the People to have been crucial to Appellant's conviction. The testimony went to the cause of death in this manslaughter case. If false, and the evidence so indicates, the conviction must be set aside.

As to the indignant assertions of purity from the prosecutor's office, the fact that two elections in last November's contests were based in part on Dr. Clark's conviction (see attached exhibit) would seem to indicate that the personnel in that office have no hesitancy in trading upon the misfortune and tragedy of others to gain political office and favor.

The writer, perhaps, is over-idealistic in expecting local overworked prosecutors to exert as much effort in protecting the accused as convicting them, but the words of Mr. Justice Campbell in WELLAR -vs- PEOPLE, 30 Mich. 16, stand out:

"A public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony."

In the interest of justice, the Motion for Remand should be granted.

JAMES E. WELLS
Attorney for
Defendant and Appellant
13050 Gavel Avenue
Detroit, Michigan 48227
933-4143

Dated: May 23, 1969

AFFIDAVIT OF IRVING SUNSHINE, PH. D.

IRVING SUNSHINE, Ph.D., being first duly sworn, deposes and says that he has published articles relating to barbiturates. In none of these publications were any data presented on the correlation of Sodium Pentothal with the clinical condition of patients.

Further Deponent sayeth not.

/s/ Irving Sunshine
IRVING SUNSHINE, Ph.D.
Cuyahoga County Coroner's Office
2121 Adelbert Road
Cleveland, Ohio. 44106

Dated: August 14th, 1968.

Subscribed and sworn to before me this 14th day of August, A.D. 1968.

/s/ Leona Phalsgraff
Leona Phalsgraff,
Notary Public for the County of Cuyahoga, State of Ohio

My commission expires: January 4th, 1972.

EXCERPTS FROM TRIAL TRANSCRIPT

WILLIAM EDWARD GORDON
DIRECT EXAMINATION

(271) Q Why is that?

A Because what you are trying to do when you do use Pentothal, or, also, Sodium Pentothal,

when you do use these, you are trying to produce a state of ultra-consciousness, which in a way is considered one of the first levels of anesthesia, (272) wherein the patient's state of consciousness is altered. They tend to lose some of their inhibitions, they tend to become less fearful, they tend to become more calm and relaxed, and they will be able to talk more easily and freely about things they might otherwise not have been able to talk about.

Now, this is close to the level that you want to accomplish. If you go ahead and carelessly or injudiciously continue to inject this drug through a stage of delirium and on to surgical anesthesia and on into a paralysis of part of their brain, this is of absolutely no value.

Q As psychiatrically speaking, is that correct?

A Yes, sir.

And I might add that there is one more important aspect of this, too, when Pentothal is used psychiatrically. The very material which is developed during the time the patient is talking with you under the influence of the drug, the things that they say, the feelings that they express are then taken like pieces of a jigsaw puzzle, or as tools with which you and the patient can then work when the patient is again conscious, rational and not under the influence of the drug. Now, this is an absolute requirement.

To just shoot in Pentothal indiscriminately is of no value.

(273) It must be for a purpose and reason. It must be used to help this patient once the patient is free of the drug.

(381) VIOLET CLARK
DIRECT EXAMINATION

* * * put everything into two cars and not take up three. So, it must have been 7:00 o'clock before they were going to go ahead, and then we were going to follow later.

Q Where is the cottage located where you were going?

A It is up in the Thumb, near Port Austin.

Q What were your plans for the weekend, how long were you going to be away?

A For the entire weekend. Quite often we come back on Sunday afternoon and quite often we don't come back until Monday morning.

Q Had you done that previously with the Philpotts?

A Yes.

Q After it was agreed how you would travel up to the cottage, what next happened?

A I got my things together so that we could put them in the car. And I saw the Doctor come out of the treatment room and he gave me the nod (indicating) so we could get things ready. So, we started to close up the place and get the windows and everything in order. Then I went into the treatment room to take a look at Grace.

Q Did he say anything to you as he came out of the treatment room?

A Not that I remember, except --

Q Can you tell us how long before he left the treatment room that you last heard conversation between the two parties in the room?

(382) A Well, they were in there quite a long time, it seemed to me. I was anxious, of course, for us to get ready to go. And he went through his regular treatment. It must have been a period of twenty-five minutes. And five or ten minutes before he came out of the room, they were still talking. I was there. The conversation went on as usual in the regular treatment.

Q You say he remained in the room for about twenty-five minutes and you heard conversation at least up until five or ten minutes before he came out?

A And then when he came out, he gave me the nod, which I knew it was time for me to get our things ready so we could go.

Q What was said to the Jelfs, you agreed to leave after he came out?

A Yes.

Q Then, did they leave the office?

A Yes, they went out the front door.

Q Where was Dr. Clark at that time?

A He went out to the back.

Q What did you do?

A I went downstairs to get my luggage together. And then I came back upstairs to close up the building.

Q How long would that take?

A Five minutes, six minutes, eight minutes.

Q Was there anyone in that room with Grace Neil during that five-minute period?

(383) A I don't think so.

Q Then, what did you do?

A I went into the room where Grace was to see how she was, as I often do with the patients. The first thing I noticed was that the saline bottle was completely empty.

Q When you refer to the saline bottle, are you referring to the People's proposed Exhibit -

A (Interposing) That's right. There should be a bottom part to that on which it hangs.

Q - 3?

A Yes.

Q Is that the way it is suspended from the wall (indicating)?

A Yes.

Q And this is called saline solution?

A That's right.

Q Does it come in that state, completely clear?

A Completely clear.

Q How was Mrs. Neil dressed when you entered the room?

A She had a -- she was covered with a blanket -- she had her clothing on. I didn't notice -- she never undressed when she took treatment, she didn't have to.

Q Did she have a blanket or anything over her?

A Yes.

Q What did you first observe when you entered the room?

A The saline bottle being --

Q That was empty?

(384) A That was empty.

Usually, it is about half full because it takes ten or fifteen minutes afterwards and the saline is the second part of the treatment. It has nothing to do with the thiopental, or Sodium Pentothal. It is completely separate from the treatment that the Doctor gives with thiopental.

* * *

THARON NEIL
DIRECT EXAMINATION

(195) A I said, "What did you say?" Then he told me again, he said, "You had better call Rev. Bayne, and here is his telephone number."

I said, "Oh, no."

He said, "I'm afraid so. She's had a heart attack."

Q Now, how long would you say that was when he said, "Call Rev. Bayne;" "I'm afraid so." How much time would you say elapsed between that time and the time you got to the Doctor's house and were in the room where Grace was lying?

A He had called -- it must have been around quarter to or ten minutes to eight when he made the last call.

Q Then, you got there when, fifteen minutes or how many minutes later?

A Well, ten or fifteen minutes later.

Q Ten or fifteen minutes later after he had called the second time?

A Yes.

Q And said, "Call Rev. Bayne;" "I am afraid so"?

A Yes.

Q And when you arrived -- you heard Mrs. Neil's testimony, didn't you?

A Yes.

Q When you arrived, did you see Mrs. Clark administering mouth-to-mouth resuscitation?

A Yes, I did.

* * *

EARL JOSEPH TEEPLES
DIRECT EXAMINATION

(98) * * *

Q What was the next thing that happened? If anything.

A I think I mentioned that I had already taken pictures in there.

Q Yes.

A I went into the next room -- which would be like an adjoining bedroom in a common home -- another treatment room, and looked in there. I noticed nothing in particular there. I did notice a metal flask of "Lifeogen" brand oxygen, which I happen to be familiar with because I bought one for a friend of mine whose child has asthma.

* * *

RICHARD E. OLSEN
DIRECT EXAMINATION

(35) A Detective Teeples.

Q Do you observe Detective Teeples in the courtroom?

A Yes.

THE COURT: Go ahead.

Q (By Mr. Bain) What were the results of this autopsy, Doctor?

A The autopsy showed the body of a middle-aged woman in a good state of general health.

In spite of my most careful examination both of the body externally, the inside of the body, inside of the head and neck, and of microscopic sections made from the organs, I was not able to point to anything and say, "This is the cause of death."

I did have an opinion as to the nature of the death, however.

Q And would that be a medical opinion, Doctor?

A Yes.

Q And what is that opinion based on?

A On the surface of this woman's body were multiple needle puncture wounds of the type made by hypodermic needles such as doctors use for injections. There were at least four

fresh wounds; two below the left breast, on the chest. I thought those were probably made after death, because there was no bleeding into the skin about them. There was one on the left wrist with a strip of adhesive tape over it. This showed bleeding and appeared to be fresh. There was one on the side of the right thigh, also, with a strip of * * *

MELVIN DALE HALL
DIRECT EXAMINATION

* * *

(29) Grand River on that evening?

A I believe it was a little later than 6:00 or 7:00 o'clock.

Q What time?

A Exactly, I think it was 8:45 p.m.

Q And what, if anything, unusual happened at that time?

A I observed a hearse that was parked on the south side of Grand River, in a no-parking zone, and without any lights on it or anything like that. It was just parked, and it was dark.

Q And after you saw the hearse, Patrolman, what did you do then? If anything.

A I parked my scout car behind the hearse, got out and checked it to see if there was anything around, or anything, or what the reason for it being parked there was.

Q And what did you do then?

A I couldn't locate anyone around the hearse. So, then, I went to the Doctor's office, which was the only place I could think of anyone being at. And the hearse was parked immediately in front of the Doctor's office on Grand River.

Q And what happened then? If anything.

A Knocked on the door, and I did not get any answer. So, I tried the door and it was open. So, I entered the building.

Q What did you do then?

A I saw a lady in -- I imagine she would be around fifty years old -- standing in the front part of the building. And I asked her if she knew who the person was that was driving (30) the hearse. And she didn't give me any answer.

Q What happened then? If anything.

A I then observed a person who later I found out was Dr. Clark. He was walking towards -- from the back of the building, towards the front. And I asked him then if he knew who was driving the hearse.

Q What, if anything, did he reply at that time?

A He told me that he had had a patient die in his office and that the hearse was there to pick up the body.

Q And what happened then? If anything.

A I asked him where the driver was. I told him I wanted the hearse moved out of the street, it was a traffic hazard.

Q Is Grand River a heavily traveled street in that area?

A Yes, sir.

Q What happened then?

A He said, "Maybe the driver is out back."

And, so, Dr. Clark kept walking closer and closer and closer to me, and I stepped around him and walked past him to about midway in the office building there to where I seen a door was open.

Q What, if anything, did you observe at that time?

A I observed a man kneeling down -- he was either still kneeling or else just rising from a kneeling position.

And I peeked around the door a little farther -- the door was only partially opened -- I peeked around a little farther and I noticed a person on a couch, (31) I would say a makeshift bed-like, it was low and so forth, and there was a body laying there of a woman that appeared to be dead to me.

Q What happened then?

A I asked the gentleman then -- who had by this time stood up -- if he knew anything about the hearse out in front. And he said it wasn't his

but it belonged to a funeral parlor and the driver was around there some place and he was there to pick up the body.

Q I see.

* * *

EARL JOSEPH TEEPLES, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. BAIN:

(85) * * *

Q Did you have occasion to go to the Clark home, the Clark office?

A Yes, sir.

Q What caused you to go there?

A Officer Hall alerted me to a situation there where somebody had passed away.

* * *

IRWIN B. POSNER
DIRECT EXAMINATION

* * *

(74) Q I see.

Now, did you ask or did you have an opportunity to observe his medical records regarding Grace Neil?

A I did.

Q Now, what, if anything, unusual did you notice on them?

A I noticed a figure of one hundred and seventy.

Q One hundred and seventy?

A Yes, sir.

Q Do you know what that figure meant?

A I asked Dr. Clark, and he said that was the weight of the patient.

Q Now, this was on Mrs. Grace Neil's medical chart, is that correct, or records?

A Yes, sir.

Q The figure one seventy?

A Yes, sir.

Q And he said that was her weight?

A Yes, sir.

Q What did you say, if anything, in response to that?

A I said that Mrs. Neil didn't look like she weighed more than one twenty to one hundred twenty-five pounds.

Q What, if anything, did he say in response to that?

A And he said no, on second thought, that wasn't her weight, (75) that was his own weight.

Q That was his weight?

A Yes, sir.

Q Of one hundred seventy pounds, on her medical record?

A Yes, sir.

Q Doctor, in your practice as a physician and surgeon, did you ever have an opportunity to put your own personal statistics or characteristics on your patients' medical records?

A No, sir.

* * *

EARL JOSEPH TEEPLES
DIRECT EXAMINATION

(103) * * * he said these were the boxes that he had discarded after giving Grace Neil her treatment. And I asked if what had been in these boxes was what he had given Grace Neil, and he said yes.

Q What was the next thing that happened then? If anything.

A I think Dr. Posner arrived -- Dr. Posner was there, I'm sorry.

I had conversation with my superior. Arrangements were made to temporarily prevent

the removing of the body for embalming or any funeral arrangements. We finally arranged to have the body transported to St. Joseph Hospital, in Pontiac.

Q And it is my understanding, according to Dr. Olsen's testimony, that an autopsy was performed the next morning; is that correct?

A Yes.

Q Were you present when this autopsy was performed?

A Yes.

Q Were you present when Dr. Olsen removed the samples, or the samples of the body fluid and blood and other specimens from the body of Grace Neil?

A Yes, sir.

Q And at that time, he gave all those specimens to you, did he?

A Yes, sir, he did.

Q What did you do with them?

(104) A I took them and put them in my refrigerator and kept them there until I was able to drive to Lansing, to the Michigan Department of Health Crime Lab in Lansing, Michigan, where I turned them over to the Toxicology Department there.

Q And at that time, did you also turn over the other items that we have mentioned?

A Yes, sir.

Q And those were the items that Dr. Kutob read off this morning, or earlier this afternoon, when he testified?

A Yes, sir.

Q Detective, you indicated that you saw some oxygen equipment * * *

S. DAVID KUTOB
DIRECT EXAMINATION

(41) Q And your next educational?

A I obtained my Ph.D. in pharmacology and toxicology from Tulane Medical School, in New Orleans, Louisiana, in 1961.

Q And what practical experience have you had in this field, Doctor?

A After graduation, I worked for the Norwich Pharmacal Company, Norwich, New York. This is concerned with pharmaceuticals, and as a group leader in toxicology.

Q And after that, Doctor?

A In 1964, I joined Loyola University, in the South, New Orleans, Louisiana, as assistant professor in pharmacology and toxicology.

Q And how long were you an assistant professor at Loyola?

A Till 1965.

Q And after that, Doctor?

A I was offered a position overseas; from which I returned in 1966 and joined the Crime Lab, in Lansing.

Q And you are still with the Crime Lab?

A Since 1966, December, 1966; I am still with the Crime Lab, of Lansing.

Q Doctor, over and above your formal schooling; have you attended any special classes or special seminars or anything of that nature in the toxicology field?

A Well, of course during my training for Ph.D., I have done some research and presented some papers at the Federation of -- of the Biological Societies, in Atlantic City and in * * *

S. DAVID KUTOB
CROSS EXAMINATION

(57) A No.

Q May I see that, please?

Now, did you refer to any other reference material?

A Yes, I did.

Q What else did you refer to?

A Dr. Irving Sunshine.

Q Where is he located?

A He is a toxicologist for the -- I don't know if I can pronounce it right -- Cuyahoga County, Cleveland, Ohio.

Q When did he write the article?

A He wrote the article in 1957.

Q Do you have a copy of that with you?

A Yes, sir, I do.

Q May I see that, please?

Did you refer to any other sources to determine what a lethal dosage of Sodium Pentothal consisted of?

A Well, not on fatalities. Others are collections here and there which I cannot quote offhand.

Q None of these reference materials that you have submitted to me today were present at the time you testified in the examination, were they?

A What do you mean "present"? On me?

Q You didn't have them?

A No, I didn't have them.

* * *

MEDICAL LICENSING BOARD HEARING

(3) ROY ASTON, M.D., having been first duly sworn by the Court, was examined and testified under oath as follows:

DIRECT EXAMINATION
BY MR. WELLS:

Q Witness, will you give us your name, please, for the record?

A Roy Aston.

Q And that last name is spelled how?

A (Spelling) A-S-T-O-N.

THE COURT: Counsel, would you use the microphone back there, please?

MR. WELLS: Oh, okay. Fine, your Honor.

THE COURT: We can hear you better that way.

Q Now, do you have a position at the Wayne State University School of Medicine presently?

A Yes, sir, I do.

Q And what is that position, please?

A Associate Professor of Anesthesiology.

Q I see. Do you hold a Ph.D. Degree?

A Yes, sir, I do.

(4) Q Dr. Aston, -- or Professor Aston, rather, would you relate for us, if you can tell us, did you have occasion in the year of 1968 to examine certain specimens in Lansing or in Detroit, relating to one Grace Neil, -- and that is N-E-I-L?

A Yes, sir.

Q And was that about September 12th or thereabouts?

A I don't recall the date, sir.

Q I see. Now, did you make these tests in Lansing, Michigan, or were they conducted in the City of Detroit, or both places?

A They were conducted, -- or, the tests were conducted in Detroit.

Q I see. That was in the City of Detroit here, is that right?

A Yes, sir.

Q Now, did you use or employ any of the equipment in Lansing, in the State Health Department, if you can recall?

A Not for the ones, -- or, not for the analysis of my own tissue samples, or that is, the ones that I had in my possession, no.

Q I see. Had you made ultra violet ray tests on various samples for barbiturates, before this particular time?

A Yes, I had.

(5) Q Did you have anybody working under your direction, doing the manual work, in this particular case?

A Yes, I had.

Q And what was his name, please?

A That was Sheldon Stolman (spelling) S-T-O-L-M-A-N.

Q And is he in the same field as you are?

A Yes, he is. He trained with me for his Ph.D., in fact.

Q I see. And is he a Ph.D. at this time?

A Yes, sir, he is now.

Q I see. Were you given two blood samples, and one sample of the stomach contents of Grace Neil, if you can recall?

A I can recall that there was stomach contents and blood, but I don't recall whether there was several blood samples of blood, or just one.

Q I see. And did you do ultra violet photo spectometry tests on these samples of blood, if you recall?

A Yes, sir, that was the nature of the tests.

Q And do you recall, in fact, finding in the blood or the blood samples, any evidence of sodium pentathol?

A As I recall, no.

Q On the calculations that you made in connection with these samples, do you recall that there was any error brought to your attention by Dr. Kutob with regard to your calculations?

A I can't recall that there was, no.

* * *

PRELIMINARY EXAMINATION, Detroit Recorder's Court No. 70-08009, 1970

S. DAVID KUTOB
CROSS EXAMINATION

(100) Q You didn't retain any of the sample?

A I did for -- recently we were cleaning and we discarded the material after two years.

Q When was that specifically?

A I'd have to look over our records, sir, it's recorded down.

Q In other words, if the defendant wanted to have a sample of this, he could not obtain it now, could he?

A No, sir, he could not obtain it now.

Q That protects your findings, doesn't it?

A I don't know what you want explained, sir. We keep them for two years and then after that we discard them.

Q You were new to that department, relatively new?

A Yes.

* * *

Q You had the samples disposed of? You did know there would be a prosecution involved in this, is that correct?

A That's correct.

Q Did you have any particular reason for believing that?

A Well the time factor is a matter of two years.

Q Had you been told by anybody that there would be no prosecution?

(101) A No, sir.

Q Had you been told by anybody that there might be a prosecution at a later date?

A No, sir.

Q Now that Cary Model 15 machine that you used, it does give a reading in molar absorbance, does it not?

A If you prepare the solution correctly, you can sit down and calculate it, yes.

Q But that was calculated in this case, was it?

A I still can do it.

Q But you didn't then, did you?

A No, sir.

Q And there is no way of confirming or disproving your earlier finding, is that correct?

A That's correct, sir.

* * *

MICHIGAN COURT OF APPEALS OPINION

BEFORE: Lesinski, C.J., Danhof and Levin, JJ.

LESINSKI, C.J.

After a jury trial, defendant Ronald Clark, M.D., was convicted of the manslaughter[1] of his patient, Grace Neil. Dr. Clark appeals alleging four instances of error.

Grace Neil died at defendant's medical clinic on November 3, 1967. An autopsy performed the day following her death failed to reveal the cause of death. However, blood and tissue analysis did reveal high concentrations of Sodium Pentothal in the deceased's blood and brain. At trial experts generally agreed that the discovered percentages of the Sodium Pentothal would indicate that death had resulted from too rapid and too excessive infusion of the drug. Other witnesses' testimony indicated that Dr. Clark had left the patient unsupervised during the infusion of the drug. In addition, it was undisputed that the doctor's office did not contain any resuscitative equipment. Finally,

[1] MCLA § 750.321 (Stat Ann 1954 Rev § 28.553).

experts in the medical profession, including general practitioners, toxicologists, anesthesiologists and psychiatrists testified that the defendant's procedure, on the day Grace Neil died, clearly violated accepted medical standards.

Defendant's first allegation of error is that the plaintiff purposely withheld certain information, i.e., the defendant's medical record of treatment of Grace Neil, which would have rebutted the plaintiff's evidence of improper treatment. The testimony of the investigating detective indicates that at the time of arrest, he requested the defendant to surrender the medical record of treatment of Grace Neil and that the defendant complied with this request. At trial the records were referred to in the testimony of witnesses. However, no objection was raised by the defense to such references nor to the fact that the medical records were not produced for the defendant nor admitted in evidence. In this connection we note that defendant admits in his brief that the fact of the medical record seizure was testified to at preliminary examination, six months prior to trial.

Defendant now asserts as he did on motion for new trial, that a request for production of the records was made prior to trial on March 15, 1968. While it does appear from documents filed with our Court that the request for production of these records was made, it would not follow from the fact that the request was not complied with, that the people deliberately withheld or suppressed evidence favorable to the defendant; no evidence showing deliberate withholding or suppression of evidence was offered in support of the motion for new trial.

Since the matter of the production of the medical records was never presented to the trial court for full appraisal, this Court cannot now determine whether there was any basis in fact for the claim that the medical records of treatment were suppressed. Where a defendant relies upon evidence dehors the record to set aside his conviction, the claim and the evidence in support of the claim ordinarily must be presented at the trial level in order to preserve the issue for appeal. People v. Ivy (1968), 11 Mich App 427, 431.

Defendant's second claim of error concerns the sufficiency of the criminal information, filed in this case, which charged that:

> "A licensed physician, did treat one Grace Neil as his patient, and in the said treatment Ronald E. Clark did then and there owe the legal duty of due professional care and caution to Grace Neil, and while so treating the said Grace Neil, Ronald E. Clark did feloniously kill Grace Neil, by his gross and culpable negligence, in that he, the said Ronald E. Clark, did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal, and by so injecting the Sodium Pentothal into the body of Grace Neil, Ronald E. Clark did directly cause the death of Grace Neil, and thus improperly performed and grossly neglected the legal duty that he, as a physician, owed to Grace Neil, and committed Manslaughter, contrary to Section 750.321 of the Compiled Laws of 1948: M.S.A. Section 28.553.".

The crime of involuntary manslaughter is "the killing of another without malice and unintentionally, but in the doing of some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful, in itself, or by the negligent omission to perform a legal duty," People v. Ryczek (1923), 224 Mich 106, 110. The information fully and fairly informed the defendant of the charge against him. (Emphasis supplied.) The information specifically charges the defendant with gross and culpable negligence and then specifically pleads the act which constituted gross negligence. MCLA § 750.321 (Stat Ann 1954 Rev § 28.553).

Defendant next argues that the information failed to advise him of the nature of the evidence to be used against him, i.e., the fact of the lack of available emergency oxygen equipment. Although defendant now claims that he objected at trial to the admission of this evidence, felt to be without the scope of the information, our review of the record fails to disclose any such objection. We will not review matters not properly preserved for appeal. People v. Ivy, supra.

Defendant's fourth allegation of error questions the sufficiency of the evidence to prove knowledge of the extreme risk involved in his conduct. Assuming arguendo that proof of knowledge of the extreme risk involved in the infusion of Sodium Pentothal is necessary for conviction, we find that the plaintiff clearly carried the burden. Expert testimony clearly established that the failure to constantly supervise a patient being infused with Sodium Pentothal was violative of accepted medical standards. Further, testimony established that every medical student and medical doctor was aware or should have been

aware of the precautions required to be taken. The testimony also established that the package containing the Sodium Pentothal also contained manufacturer's instructions detailing the necessary precautions. Finally, the Physicians Desk Reference contained in Dr. Clark's library, details the procedures for use of the drug. According to the totality of the testimony, Dr. Clark did not follow the required procedures when he administered the lethal dose of Sodium Pentothal to Mrs. Neil. Instead, he failed to maintain adequate resuscitative equipment, discarded the manufacturer's instructions, administered the drug without assistance, and left Mrs. Neil alone in the examination room during infusion. We find no error in the proceedings below. There was sufficient evidence, if believed, for the jury to find defendant guilty beyond a reasonable doubt. People v. Williams (1962), 363 Mich 494.

Affirmed.